

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AALACHO MUSIC, LLC, a Washington  
limited liability company,

Plaintiff,

vs.

DEEP DISH RECORDS, INC., a District of  
Columbia corporation, and YOSHITOSHI  
SHOP, L.L.C., a limited liability company,

Defendants.

NO. CV03-2358L

**AALACHO MUSIC, LLC'S  
REPLY IN SUPPORT OF ITS  
MOTION FOR LEAVE TO  
AMEND COMPLAINT**

**I. INTRODUCTION**

In this copyright infringement action brought by Aalacho Music, LLC ("Aalacho") against Defendants Deep Dish Records, Inc. and Yoshitoshi Shop, L.L.C (together, "Defendants"), Aalacho seeks to add as defendants the Defendants' shareholders/directors/officers. Whereas individual defendants usually point their finger at a corporation to escape personal liability, the corporate defendants in this case request the Court excuse their infringements because their individual shareholders/directors committed the infringing conduct. According to Defendants' theory, Aalacho will never recover for these infringements unless they sue Sharam Tayebi and Ali Shirazinia (the "DJs") and another company the DJs own, Deep Dish Productions, Inc. (the "DJ Entity").

1 Aalacho should not be denied the opportunity to be made whole because Defendants  
 2 withheld the fact that their directors/officers were acting in an individual capacity outside  
 3 of their scope as corporate representatives. Aalacho's request comes immediately after it  
 4 learned about the involvement of the DJs and the DJ Entity. Until recently, in their  
 5 opposition to motion for summary judgment, Defendants never disclosed that the DJs and  
 6 DJ Entity are responsible for the infringements.

7 No party will suffer any prejudice by the addition of the DJs and the DJ Entity to  
 8 this lawsuit because the discovery and claims relating to them will be identical to those  
 9 relating to their entities which are already defendants. Defendants' futility argument is  
 10 unavailing. Courts ordinarily consider challenges to sufficiency of the pleadings after  
 11 allowing amendment. Moreover, the proposed amended pleading satisfies the requisite  
 12 standard. Accordingly, Aalacho's request to amend should be granted.

## 13 II. DISCUSSION

### 14 A. AALACHO EXERCISED DILIGENCE IN SEEKING TO ADD THE DJs OR THE DJ 15 ENTITY

16 Defendants argue that Aalacho unduly delayed addition of the DJ and the DJ  
 17 Entity because Aalacho knew or should have known about the DJ's involvement in the  
 18 infringing activity through examination of the liner notes of the *Toronto* CD, and that  
 19 Aalacho was aware "at the very least, that Global was responsible for releasing the CD  
 20 and for procuring rights in the Track." (Opposition (Dkt. #81), p. 11.) Defendants  
 21 further argue that Aalacho "elected to conduct no further discovery on these issues."  
 22 (Opposition, p. 12.) The record belies Defendants' allegations.

23 From the onset of this dispute, Aalacho sought to hold responsible the parties that  
 24 actually infringed on its copyrights. Defendants have not cooperated in any regard with  
 25 respect to the disclosure of the various "Deep Dish" entities and individuals—all affiliated  
 26 with one another—who were involved in the infringing activity. In numerous instances,  
 27 Defendants failed to disclose or acknowledge the existence of the DJ Entity or the DJs as  
 28 separate from the Defendants, even though Aalacho's discovery specifically sought such

1 information. For example, Aalacho's Interrogatory No. 3<sup>1</sup> sought identification of all  
 2 "affiliate[s] of Deep Dish." Defendants' response did not include the DJ Entity.  
 3 Aalacho's discovery covered a variety of relevant matters such as the relationship  
 4 between Yoshitoshi and Deep Dish (Interrogatory No. 7), and the identity of any  
 5 individuals or entities who would have information relevant to this lawsuit (Interrogatory  
 6 No. 2). Defendants did not disclose or identify the DJ Entity, or the DJs in their  
 7 individual capacities, in response to any one of these requests. Indeed, in response to the  
 8 pointed question seeking disclosure of the identity of "any and all persons [defined to  
 9 include business entities] who facilitated and/or assisted with any modification and/or  
 10 editing of the Track," Defendants failed to identify the DJ Entity, or identify the  
 11 individual DJs as separate from their identities of principals of Yoshitoshi and Deep Dish.  
 12 Thus, Defendants' claims that Aalacho "sat on its hands," (p. 11) or "waited, until past  
 13 the eleventh hour," (p. 6) lack any support in the record. To the contrary, Defendants  
 14 shirked their responsibility to inform Aalacho that with respect to some of the  
 15 infringements, the DJs and the DJ Entity were actually the responsible parties. This  
 16 strategy was first revealed to Aalacho in the Defendants' responsive filings to Aalacho's  
 17 Motion for Summary Judgment. (Dkt. #71 "Summary Judgment Opposition".) In that  
 18 filing, Defendants first made known the existence of "Deep Dish Productions Inc., a  
 19 corporate entity distinct from either defendant." (Summary Judgment Opposition, p. 4.)<sup>2</sup>  
 20 The Declaration of Ali Shirazinia attached to the Summary Judgment Opposition clarified  
 21 that "[t]he DJ performers known as Deep Dish are to be distinguished from Deep Dish  
 22 Records, Inc., a defendant in the above-captioned action." (Shirazinia Decl. (Dkt. #73),  
 23 p. 2.)

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25 <sup>1</sup> Aalacho attaches the Interrogatories and Requests for Production propounded by it, along with  
 26 Defendants' responses, to the declaration of Venkat Balasubramani, submitted herewith.

27 <sup>2</sup> Defendants cannot point to any documents or responses to any Aalacho discovery in which  
 28 Defendants actually informed Aalacho of the existence of the DJ Entity or the fact that the DJs acted outside of  
 the scope of their capacity as corporate officers in the context of the events underlying this lawsuit.

**B. DEFENDANTS WILL NOT SUFFER ANY PREJUDICE AS A RESULT OF THE PROPOSED AMENDMENT**

“Prejudice is the touchstone of the inquiry under rule 15(a).” Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2003). The Ninth Circuit in that case held that absent prejudice, or a strong showing of any of the remaining reasons for denial of leave to amend, “there exists a presumption under Rule 15(a) in favor of granting leave to amend.” Id. In this case, Defendants will not suffer any prejudice as a result of the proposed amendment.

1. Discovery and preparation for trial.

The most common prejudice a party opposing an amended complaint would suffer would be the additional discovery and trial preparation required as a result of the addition of a new party or claim. *See, e.g., Ansam Ass’n v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) (denying leave to amend based on discovery and trial-related prejudice to opposing party). This case lacks any prejudice of that type. Defendants fail to demonstrate how the case preparation undertaken by the DJs and the DJ Entity would be any different from the case preparation required to be undertaken by the Defendants. Except with respect to the involvement of the individual defendants themselves (for which no discovery is required), the operative facts around the claims and defenses are the same whether asserted against the DJs and the DJ Entity, or by the existing Defendants. The Defendants, the DJs, and the DJ Entity would need to obtain the same evidence, documents, and testimony from Aalacho or other third parties. Consequently, neither Defendants nor DJs or the DJ Entity would suffer prejudice with respect to discovery or trial by the addition of the DJs of the DJ Entity.

2. Addition of Global.

The DJs and the DJ Entity argue that they would have added Global Underground, Ltd. (“Global”) as a defendant in this lawsuit had the DJs and the DJ Entity been made a party to this case earlier on. The argument that the DJs and the DJ Entity would have

made Global or other “others involved in the retail distribution of the CDs”<sup>3</sup> parties is a red herring. According to their responsive pleadings to Aalacho’s summary judgment motion, Defendants (*i.e.*, the existing defendants) relied on Global’s assurances with respect to exploitation of the Track. Defendants could have sought to hold Global liable for Aalacho’s claims. However, Defendants (who are controlled by the DJs) chose not to add Global as a party. The DJs should not now rely on this concocted prejudice to resist Aalacho’s request to amend.

**C. DEFENDANTS FAIL TO SATISFY THE FUTILITY STANDARD**

A claim is considered futile if “there is no set of facts which can be proved under the amendment which would constitute a valid claim or defense.” Netbula v. Distinct Corp., 212 F.R.D. 534, 538 (D. Cal., 2003) (citing Miller v Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)). Denial of leave to amend on grounds of futility is rare. Courts ordinarily grant leave, and defer substantive objections to the pleadings until after leave to amend is granted and the amended pleading is filed. *See Netbula v. Distinct Corp.*, 212 F.R.D. at 538 (N.D. Ca. 2003) (citing Schwarzer, CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL at 8:422). Courts apply the Rule 12(b)(6) standard in determining futility. Shane v. Fauver, 213 F.3d 113 (3d Cir. 2000).

Aalacho alleges sufficient jurisdictional facts in the Amended Complaint to withstand a motion to dismiss under Rule 12(b)(6). Specifically, Aalacho alleged that “Defendants . . . availed themselves to the laws and benefits of the State of Washington by doing business with Aalacho in the state of Washington, and by wilfully infringing upon Aalacho's copyrights knowing that Aalacho would be affected thereby in the State of Washington.” (*See* Amended Complaint, Exhibit B to Balasubramani Decl.) This allegation is sufficient to withstand a motion to dismiss, which is the appropriate standard. Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1285 (9th

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<sup>3</sup> Defendants fail to identify any such parties, and the basis upon which it would seek to add those parties.

1 Cir. 1977) (noting that only a prima facie showing of jurisdiction is required).  
 2 Additionally, the Court previously ruled that Deep Dish and Yoshitoshi are subject to  
 3 personal jurisdiction based on their sales of the infringing material in the State, and  
 4 negotiations with residents of the State. Aalacho should have an opportunity to put forth  
 5 evidence sufficient to impute these contacts to the DJs and the DJ Entity.

### 6 **III. CONCLUSION**

7 Aalacho exercised reasonable diligence in seeking to add two individuals and an  
 8 entity who directly participated in the infringing activity as parties to the lawsuit.  
 9 Aalacho exercised reasonable diligence in conducting discovery, and notwithstanding that  
 10 exercise of diligence, did not become aware of the DJs or the DJ Entity or their  
 11 involvement in the infringing conduct until Defendants filed their opposition to Aalacho's  
 12 summary judgment motion. Because the discovery and strategic considerations between  
 13 the Defendants and the DJs and the DJ Entity are similar if not identical, neither  
 14 Defendants nor the DJs or the DJ Entity will suffer prejudice as a result of the proposed  
 15 amended complaint. In contrast, Aalacho may suffer substantial prejudice if it is not able  
 16 to add these parties. For the foregoing reasons, Aalacho respectfully requests that the  
 17 Court grant Aalacho's motion.

18 DATED this 12<sup>th</sup> day of August, 2004.

19  
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 21 **ATTORNEYS AT LAW, LLP**

22  
 23 By: 

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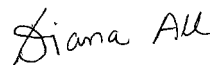
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 12<sup>th</sup> day of August, 2004, I caused the foregoing **AALACHO MUSIC, LLC'S REPLY RE MOTION FOR LEAVE TO AMEND AND CERTIFICATE OF SERVICE** to be served via NOTICE OF ELECTRONIC FILING on the following parties:

**Alan S. Middleton, Esq.**  
**Eric Stahl, Esq.**  
Davis Wright Tremaine LLP  
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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct and that this declaration was executed on August 12<sup>th</sup>, 2004, at Seattle, Washington.



Diana Au